No 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants

FOR APPELLEES:

A BRIEF ON MOTION TO DISMISS APPEAL

B ALTERNATIVELY, REPLY BRIEF ON MERITS OF APPEAL

P. H. B. KENT,
Barrister at Law,
of Kent & Mounsey,
Tientsin, China

FRANK E. HINCKLEY,
Merchants Exchange, San Francisco
Attorneys for Appellees and Cross-Appellants

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Cases Cited, and Other Authorities Referred to

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Appellant and Cross-Appellee,

vs

Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng,
Appellees and Cross-Appellants

FOR APPELLEES:

A BRIEF ON MOTION TO DISMISS APPEAL

I REPRINT OF TEXT OF MOTION

The original of the motion, of notice thereof and of admission of notice are filed in the office of the Clerk of Court. They read as follows:

[Title of Court and Cause]

MOTION TO DISMISS APPEAL

Appellees respectfully move to dismiss appeal, and as reasons for said motion they assign:

1 The appeal presents no question of sufficiency of the evidence to support the judgment;

2 The appeal presents no error apparent on the face of the record.

And appellees request that the entire transcript of record on appeal be taken as incorporated with this motion.

Dated: June 10, 1929

Signed: Above named Appellees
by P. H. B. Kent
and Frank E. Hinckley
their Attorneys

NOTICE OF MOTION

To above named Appellants, and to Messrs Fleming, Franklin & Allman and Messrs Pillsbury, Madison & Sutro, their Attorneys:

Notice is hereby given that above motion will be presented on June 17, 1929, at 10:30 am or as soon thereafter as it may be heard.

Dated: June 10, 1929

Signed: Above named Appellees
by P. H. B. Kent
and Frank E. Hinckley
their Attorneys

Receipt this 10th day of June, 1929, of above Notice and of a copy of above Motion to Dismiss Appeal and of said Notice is hereby on the same date admitted.

Signed: Above named Appellants
by FLEMING, FRANKLIN & ALLMAN
and PILLSBURY, MADISON & SUTRO
their Attorneys
FLEMING, FRANKLIN & ALLMAN
PILLSBURY, MADISON & SUTRO
ALFRED SUTRO
By EUGENE M. PRINCE

Endorsed:
Filed Jun 10 1929
PAUL P. O'BRIEN,
Clerk

II POINTS AND AUTHORITIES ON MOTION TO DISMISS APPEAL

POINT ONE: THE PROCEDURE AND RECORD FOR APPELLANT PRESENT NO QUESTION FOR REVIEW

Appellant, in his brief, relies upon one and another part of the Transcript of Record indifferently of required procedure and practice for basis of appeal and without apparent care whether or not the appellate rules and decisions have been, in this case, observed. For instance, appellant relies upon parts of the "Decision and Judgment" which are plainly but opinion or comments of the trial court as if these parts were special findings. Bf 2, using Tr 50; and Bf 10-11, using Tr 38-40.

Appellant, further, has nowhere presented any question on the face of the record, offering to bring the same for review.

In *China Press v Webb,* 7 F 2d 581, 582, August 24, 1925, before this Circuit Court of Appeals, Circuit Judges Gilbert, Hunt and Rudkin, with opinion by Circuit Judge Hunt, all concurring, the law was stated in form that essentially and almost exactly applies to the instant appeal. The statement was:

> "The cause was tried to the court, which, after hearing the testimony, filed a written opinion entitled 'Decision and Judgment,' in favor of Webb. In his opinion, which covers 40 pages of the record, the judge makes an elaborate examination of the testimony, dividing his discussion into several parts, and at the conclusion of each part he finds 'as a fact from all the evidence,' etc. Judgment was entered, and the corporation brought writ of error.
>
> The assignments relied upon are based upon rulings upon evidence introduced upon the trial.
>
> The record fails to show that any exception whatever was taken until nearly 60 days after the judgment was entered. . . . Upon the trial there was no motion or request for special findings; nor at the close of the testimony was there a request for a finding on the issues; nor did defendant present to the trial court the question of law, whether there was substantial evidence to sustain the findings for the plaintiff below. The record therefore presents no question of the sufficiency of the evidence to support the judgment.
>
> *Penn. Casualty Co. v. Whiteway,* 210 F. 782, 127 C. C. A. 332;

Dangberg Land Co. v. Day, 247 F. 477, 159 C. C. A. 531;

Pederson v. United States, 253 F. 622, 165 C. C. A. 248;

Pennok Oil Co. v. Roxana Petroleum Co. (C. C. A.) 289 F. 416;

United States v. Union Stock Yards (C. C. A.) 291 F. 366;

Blumenfeld v. Mogi (C. C. A.) 295 F. 123;

Bank of Waterproof v. Fidelity Co. (C. C. A.) 299 F. 478.

The opinion of the trial judge with its several conclusions is not a special finding which authorizes this court to determine whether the facts found support the judgment.

Northern Idaho, etc., Co. v. Jordan Land Co. (C. C. A.) 262 F. 765;

Java Cocoanut Oil Co. v. Pajaro Valley Bank (C. C. A.) 300 F. 305.

At most the finding is a general one, having the same effect as though the case had been tried to a jury. We are therefore limited to a determination whether there is error apparent upon the face of the record.

Law v. United States, 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401,

and cases already cited.

. . .

It would seem to be a simple matter to conform to the established procedure and practice. To take an exception at the time of ruling of the court in the progress of the trial, and duly to present the same by a bill of exceptions and to prepare the record with the assignment of error,

are steps requiring no more formality in the course of a law action tried in the United States Court for China than in an action carried on in a federal court in another locality. It is evident that the statutes preserve that harmony of system contemplated by general statutes which are applicable and which have been judicially construed as controlling.

Dunsmuir v. Scott, 217 F. 200, 133 C. C. A. 194;

Warren v. Bromley (C. C. A.) 288 F. 563.

As no error appears on the face of the record, the judgment must be affirmed.

Affirmed."

China Press v Webb was followed in:

Wulfsohn v Russo-Asiatic Bank, 11 F 2d 715, 716

where this Circuit Court of Appeals, Circuit Judges Hunt, Rudkin and McCamant, with opinion by Circuit Judge Rudkin, said:

". . . After the close of the trial the court delivered its opinion in writing and gave judgment for the plaintiff below. Numerous errors have been assigned, and many questions of public and private law have been discussed in the briefs of counsel for plaintiffs in error; but many of the errors thus assigned are not open to review on the record brought here, because no request was made to the court at the close of the trial to find the facts specially, or to find generally, for the plaintiffs in error. In the absence of any such request, and a ruling thereon and an exception thereto, the general finding of the court stands as

the verdict of a jury, and an exception thereto presents no question for review.

This rule has been so often affirmed by this court that it is deemed scarcely necessary to refer to the authorities. However, see

China Press v. Webb (C. C. A.) 7 F. (2d) 581,

where the rule is held applicable to writs of error to the United States Court for China, and the cases there cited. The only questions subject to review, therefore, are rulings made during the progress of the trial, to which exceptions were reserved, and errors apparent from an inspection of the pleadings, process, and judgment."

China Press v Webb has also been followed in reported cases to date, including reports to 31 F 2d 1023 (31 F 2d complete), in:

Isaacs v DeHon, CCA 9, 11 F 2d 943, 944;

Thompson-Starrett Co v La Belle Iron Works, CCA 8, 17 F 2d 536, 539;

Lahman v Burnes National Bank, CCA 8, 20 F 2d 897, 899;

Gillespie v Hongkong Banking Corp, CCA 9, 23 F 2d 670, 671;

In the last cited case, before Circuit Judges Gilbert, Rudkin and Dietrich, opinion by Circuit Judge Rudkin, this Circuit Court of Appeals said:

"This is a writ of error to review a judgment of the United States Court for China in favor of the plaintiff, based on special findings of fact. The assignments of error are all based on the

insufficiency of the testimony to support some of the special findings, but the findings themselves were not excepted to, and the sufficiency of the testimony to support them was not challenged in the court below. On such a record it is firmly settled, if a question of practice and procedure can ever be settled, that there is no question before this court for review.

". . . A wealth of authority from other circuits might be cited, but, as already stated, the rule is too firmly established to admit of further controversy. Writs of error to the United States Court for China form no exception to the rule . . ."

We submit that in this appeal there is no question for review.

POINT TWO: FURTHER, AS TO BOTH REASONS STATED IN MOTION TO DISMISS APPEAL, APPELLANT (a) URGES NO ERROR THAT HAD BEEN ASSIGNED, (b) ACTUALLY, AND IN SELF-CONTRADICTION, IN HIS BRIEF, OPPOSES AND DENOUNCES AS CONTRARY TO LAW THE FIRST AND MAIN ERROR HE HAD ATTEMPTED TO ASSIGN

(a) The assignment of errors is printed in the brief at pages 7 to 9. Excepting this printing there is no reference whatsoever in the brief to this assignment.

Under Rules 11 and 24 of this Circuit Court of Appeals the assignment must be taken as abandoned by appellant and it may be disregarded by the Court.

(b) On a single page (page 7) of appellant's brief the opposed positions of appellant's counsel at Tientsin and San Francisco are shown. *At Tientsin*

the transaction was not of pledge, and the trial court was assigned error for holding the transaction to be of pledge. *At San Francisco the transaction is of pledge,* and the argument of the brief is that the trial court should have given the transaction a certain desired effect of pledge.

We read on page 7 of appellant's brief, referring to the decision of the trial court:

> *"It found that the flour mentioned in the documents held by the National City Bank had been delivered to the Warehouse Company in pledge, and also held the documents sufficient in form to constitute a valid pledge of the flour by the Trading Company to the Warehouse Company* (Tr. pp. 37-38)."

We also read on the same page 7, under the title "Assignment of Errors," "(Tr. pp. 66-68.)":

> *"1. That the United States Court for China erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and The National City Bank of New York was that of pledgor and pledgee (Decision and Judgment, pages 6 to 9, inclusive)."*

And counsel at San Francisco manifest elsewhere in their brief a predilection for designating the transaction one of pledge. At page 2, where they are paraphrasing the language of the Transcript, page 19,

"We have received *the goods* mentioned . . ."

counsel write,

". . . it had received *the pledged flour* . . .", italics ours. This change in language occurs again in counsels' brief at page 20, where the documents of

> ". . . *the pledged flour* . . . are warehouse receipts just as much as the "godown warrants" of plaintiffs."

In the heading of counsels' argument, page 9, the language is (italics ours):

> "The National City Bank, as assignee of *a valid pledge* made by the Trading Company to the Warehouse Company, and as holder of the Warehouse Company's receipts evidencing the deposit of the flour subject to *the pledge,* is entitled to participate ratably with the other receipt-holders in the distribution of the proceeds of the sale of the flour."

In view of the foregoing differences between counsel on trial and counsel on appeal,—differences that amount to direct antagonism,—the appellees, being in the fortunate position of a spectator to this conflict,—*tertius gaudens,*—but propose, by motion to dismiss, that the strife no longer continue in court.

B ALTERNATIVELY, REPLY BRIEF ON MERITS OF APPEAL

POINT ONE: APPELLANT, IN HIS BRIEF, ATTEMPTS TO HAVE THE CASE DEALT WITH AS IF IT HAD BEEN IN EQUITY, WHEREAS UPON ITS TRIAL AND IN ITS RECORD IT WAS AND IS AT LAW.

Appellant's brief opens with the statement:

"This is an appeal and *cross-appeal* from a *decree* (our italics) of the United States Court for China." Bf 1. For the cross-appeal appellant need not have spoken. For use of the word "decree" in referring to what the trial court designated the "Decision and Judgment" any justification is not ventured in appellant's brief. Neither is there any justification for the similar description at Bf 18:

> "4. A proceeding, like this proceeding, for the ratable distribution of a deficient quantity of warehoused goods, is in *equity* (italics ours), and all claimants must be made parties . . ."

or of the description at Bf 21:

> "Conclusion. We submit that the *decree* (our italics) denying The National City Bank a ratable proportion of the amounts realized from the sale of the flour is *inequitable* (again our italics) . . ."

All these words relating to equity first appear in this matter in appellant's brief. Upon the trial the action was at law. Both plaintiffs and defendant took it to be at law, and their respective parts in the transcript on appeal are prepared for appeal of an action at law. And the action was not, as appellant says, for "ratable distribution." The parties to the action had agreed upon distribution ratably to their ware-

house receipts. The sum for distribution was Tientsin currency $291,475.16, Tr 11, and all of this, it appears, has been distributed excepting $53,137.32. The latter amount the assignee, herein defendant, withheld and gave as his reason that one not a party to the action, namely the National City Bank, held documents that he, the assignee, regarded equivalent to warehouse receipts. Therefore the question was of the character of these documents offered as equivalent to warehouse receipts. Accordingly the action was laid in debt. This would oblige the assignee defendant to show from his "writings" that he was not indebted.

The documents of the Bank, unfortunately, had come to it by assignment from the defaulting warehouse company. The warehouse company and the trading company were causes of mistrust throughout the trial. The National City Bank chose to keep clear of them.

The Bank has, upon the face of things, kept clear also of the appeal. If the appeal were in equity, with privilege of *de novo* hearing and disposition finally, why should the Bank still stand apart? Appellant's brief, Bf 18-9, reads:

> "4. A proceeding, like this proceeding, for the ratable distribution of a deficient quantity of warehoused goods is in equity, and all claimants must be made parties . . .".

The same Bank, in another case brought from China, obtained reversal for non-joinder in an action at law.

> *National City Bank v Harbin Electric etc Co,*
> CCA 9, 28 F 2d 468, 470-1

The principles as to necessary parties are therefore present in appellant's mind excepting the vital principle that the *de novo* privileges sought by appellant in attempting to make out this action to be in equity obligate primarily the appellant to bring in the alleged necessary party, that is the Bank.

It is of course now much too late to transform into equity an action commenced at law. The action would have to be born again and to arrive at the appellate court embodied and clothed in an entirely different record.

In connection with the argument of appellant that this case was in equity citation is made of

Smith v Moors & Co, 215 Pa 421, 64 Atl 593.

This case was decided in 1906. To 1929, May, according to Shepard's Atlantic Reporter Citations, the case has not been cited as authority in any judicial opinion. The opinion in Smith v Moors & Co is loosely drawn. From it our opponents take a quotation from

Story, Equity Jurisprudence, 13th ed, Sec 754.

The quotation is incorrectly cited and erroneously quoted; besides the subject of which Justice Story is there speaking is the marshalling of assets of the estate of a deceased person! We should not expect to find in Story much law on warehousing. Even in

Langdell, A Brief Survey of Equity Jurisprudence, 1904-5

there are only some of the more fundamental principles. At page 86 Langdell says of the action of accounting in equity, and would, we believe, say the same of an action for "ratable distribution", that the

striking of a balance of account between the parties, like the distribution among these parties that had been agreed among them as having warehouse receipts, would defeat the action in equity.

> "The balance therefore necessarily becomes a debt, and can be recovered only as such. In ancient times such a balance was recovered by an action, called an action of debt for the arrearages of an account. In modern times it may be recovered by an action of debt or of *indebitatus assumpsit* upon an *insimul computassent* or account stated."

The period of heavier litigation as to grain warehouses and the legislation that culminated in the uniform warehouse receipts acts came much nearer our own times than the cases mostly cited by appellant.

Among all the cases brought here from the United States Court for China only one has been in equity.

> *Andersen, Meyer & Co v Fur & Wool Trading Co,* CCA 9, 14 F 2d 586, 589

The appellate procedure in that case was in no point objected to; it conformed to the equity rules. The case was before Circuit Judges Gilbert, Hunt and Rudkin, with opinion by Circuit Judge Gilbert; and the opinion reads at the page cited:

> "The statutes creating the United States Court for China make no provision for jury trials. The appellant participated in the trial without objection to the form of the action or to the jurisdiction. The trial would have been had in no different manner had it been regarded a law action, and the amount recoverable under the pleadings, the stipulation, and the evidence would have been the same in either form of action."

Appellant, upon arrival of the present case at San Francisco, exerts every effort to have the case taken as in equity. At Tientsin, however, the form was indifferent; and whatever preparations for appeal may have been in mind of trial counsel, the essentials of an equity appeal were not at all in mind.

O'Brien, Manual of Federal Appellate Procedure, ed 1929, 51-9

Yet the obligations as to appellate procedure are specified in the Act of Congress creating the court:

34 *St L* 814, Sec 3,

and from beginning to end the appellate courts at San Francisco have reasoned in their opinions and ruled upon no other subject so frequently. In the first in date of these appealed cases, one from Canton, China,

Steamer Spark v Lee Choi Chum, 1872, 1 Sawyer 713,

an attempt was made by most able counsel, eminent at the admiralty bar, Milton Andros, to have the vessel itself be appellant! Also, the record was but a mass of papers without those necessary to appeal. Appeal dismissed. The second case was from Hiogo (near Kobe), Japan, and its record also was fatally defective.

Tazaymon v Twombly, 1878, 5 Sawyer 79

In the present case there is a so called bill of exceptions, with no exceptions, and there is no statement of the case or other essential of an equity appeal. "The common-law bill of exceptions is not the proper way to present the evidence in an equity appeal."

Struett v Hill, CCA 9, 269 F 247, 249

If in equity, apart from face of the record, the deficiencies of the present appeal make it deserve to be dismissed.

POINT TWO: WHATEVER THE NATURE OF THE ACTION, APPELLANT'S RELIANCE, GENERALLY, UPON PROCEDURE AND RECORD WANTING IN EVERY REQUIREMENT, DEFEATS THE APPEAL

It is in actions at law that appellate review is upon its ordinary and main course. Other forms of action take their bearings from those at law, and their requirements are not thereby, as a rule, lessened but are made more imperative and exacting. In the present matter there is extreme or utter want of observing the requirements.

For extension of this argument and especially for quotation of authorities we desire to refer to our brief, printed above, on our motion to dismiss. The authorities there quoted are, mainly:

China Press v Webb, 7 F 2d 581, 582;

Wulfsohn v Russo-Asiatic Bank, 11 F 2d 715, 716

POINT THREE: RELYING UPON GRAIN WAREHOUSE CASES OF EARLIER PERIOD, APPELLANT IGNORES THE STATUTES THAT CONTROLLED, AND BOTH UPON TRIAL AND UPON APPEAL IGNORED THE STATUTES NOW CONTROLLING IN UNITED STATES JURISDICTION IN CHINA

The common law that the intermingling of fungible goods by a storage man who was originally a bailee made the transaction a sale and himself the buyer was changed by statute. The Minnesota statute is an example. Appellant's leading case is

National Exchange Bank v Wilder, 1885, 34 Minn 149, 24 NW 699

In his brief at Bf 14 he quotes from

Eggers v Hayes, 1889, 40 Minn 182, 41 NW 971

which refers to the case next before cited and quotes it. But appellant's quotation omits the sentence next preceding what he quotes. That sentence refers to the controlling statute that modifies the common law; it reads:

> "That part of the warehouse law of 1876—found in chapter 124, Gen. St. 1878—bearing upon this case has been construed in Bank v Wilder . . . In that case, which controls this, . . ."

That warehouse law was carried forward, as may be seen by tracing the judicial decisions, into

> *Minnesota General Statutes,* 1913, Sec 4490: "Delivery for storage a bailment — The delivery of grain to any warehouseman for storage, although it may be mingled with that of others, or shipped or removed from the original place of storage, shall be deemed a bailment, and not a sale."

This, then, is the statute, relating to grain, ordinarily fungible, which appellant seeks to apply to certain

designated brands of flour not fungible,—a statute of Minnesota for application in China!

Certain limitations of the Minnesota statute are of interest. We quote from

Torgerson v Quinn-Shepardson Co (Supreme Court of Minnesota) 9 Jan 1923, 201 NW 615, 616

"The storage of oats with an agreement to return equal amount in kind though not the identical oats deposited constituted a bailment. This is the direct declaration of the statute.

G. S. 1923, Sec 5078; *G. S. 1913,* Sec 4490

The statute changed the common law rule which made grain so deposited and intermingled a sale.

Nat. Ex. Bk. v. Wilder, 34 Minn. 149, 24 N. W. 699 . . ."

A glance at the texts of warehouse receipts in cases of this nature for nearly twenty years back from today shows instantly how elaborate the receipts are and how impossible of application even for illustration in the present case.

Besides, the particular Minnesota statute is a special statute entirely separate from the legislation known in Minnesota and many other States as the uniform warehouse receipts act.

The uniform warehouse receipts act was enacted by Congress also for the District of Columbia, and therefore, under

Biddle v United States, CCA 9, 156 F 759, 763

it is one of "the laws of the United States" in force in

the jurisdiction of the United States in China in accordance with

34 *St L* 814, Sec 4

The legislation for the District of Columbia does not appear to have provisions corresponding to the statute of Minnesota that appellant relies upon; neither does the entire series of appellate decisions in or relating to the District of Columbia have warehouse cases bearing upon the points in this connection. We suppose storage in the District of Columbia has seldom been of grain or, possibly, even of grain products. At least neither counsel at Tientsin nor counsel at San Francisco for this warehouse company has not invoked Acts of Congress or decisions of our appellate courts. Instead counsel select the various laws and decisions of various States. They do not persuade anyone what the law in China is. They are far from making a basis in law for this appeal.

POINT FOUR: THE TITLE CLAIMED THROUGH APPELLANT WAS DERIVED FROM THE WAREHOUSE COMPANY WHICH HAD NO TITLE TO GRANT

On the face of the record it is clear, and it is the most outstanding feature of the case, that the Chinese trading company and the nominally American incorporated warehouse company together had been perpetrators and agencies of the perpetrators of stupendous fraud, and that the banks, Chinese and American, as victims of fraud, desired to clear themselves from

accounts as directly as possible. The banks agreed on common action, assuming their documents were warehouse receipts, all documents relating to specific brands of flour. They found afterwards that the American bank had documents that differed. The bank described its documents as "godown warrants or trust receipts". These are not the same. In China, as it is commonly known, they are very different, and one of them is exclusive of the other. Five of the six of the American bank's documents related to no specific brands, and the sixth related in one half of the specified flour to a brand of flour that had not come into possession of the assignee. At least one of the Chinese banks held a warehouse receipt that specified flour of a brand that had not come into possession of the assignee, and this bank, although the amount of the flour was large, had withheld from making any claim on basis of that receipt. The American bank, however, not only claimed generally on unspecified flour as to five documents, but for two lots of supposedly stored flour claimed by documents of two different and mutually excluding natures both dated the same date and not referring one to the other, the warehouse company issuing to the bank a warehouse receipt for goods of which it was not owner. These facts are shown in the pleadings and are basis of the judgment. They are facts which make it difficult, under most liberal consideration, to find any merit in the appeal.

The appellees, therefore, respectfully presenting all the foregoing reasons:

1 That the case is at law;

2 That no procedure or record for review was made;

3 That sundry laws of various States are not "the laws of the United States" applicable in China;

4 That appellant's claim had no lawful origin;

applies to the Honorable the Circuit Court of Appeals to affirm the judgment appealed from, with costs.

Dated, San Francisco,
June 15, 1929

Respectfully submitted,
P. H. B. KENT,
Barrister at Law
FRANK E. HINCKLEY,
Attorneys for Appellees and Cross-Appellants